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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961

No. 837

JOHN L. LEWIS, HENRY G. SCHMIDT and JOSEPHINE ROCHE, as Trustees of The United Mine Workers of America Welfare and Retirement Fund, *Petitioners*,

v.

EDWARD MEARS, Individually and Trading as Mears Coal Company.

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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*To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Though Mears' brief opposing certiorari challenges Trustees' assertion he admittedly signed the collective bargaining agreement requiring Mears to pay the per

ton royalty and seeks to impress this Court that Mears signed only "a blank, undated form". (Br. 9). It suffices, to show the fallacy of Mears' statement, that the trial court's jury charge included, without Mears' objection, that (J.A. 110a)

> "The written instruments . . . introduced . . . as Exhibits 1, 2 and 3 . . . have all been signed by John L. Lewis, President, and other officers of the Union, *and by Edward Mears.*"

*Whether Mears executed the agreement was never an issue; Mears conceded he had* (Stipulation, J.A. 35-6a, 37a, 38a, 47a) and the trial court regarded the signatures of those signing for the Union as genuine (J.A. 37a).

Further challenge to Mears' repetitive description of the agreement as a mere "blank" (Br. 9, 10, 14, 17) and his claimed inability to make "a fair analysis of this involved document" (Br. 10) is found in Mears' own testimony that "*we had discussed most anything that was necessary to know about them then*" (J.A. 48a). Also whether UMW would sign the agreement was never an issue and Mears does not contend it was. Indeed, since the agreement which Mears signed was the industry-wide agreement negotiated by UMW and prevailed in the bituminous coal industry, it is a frivolous argument for Mears to contend (Br. 16) that UMW could have amended it or refused it when, as a matter of fact, it did neither.

While the jury answer was favorable to Mears that the agreement "*signed by Mears*" would not become enforceable until Mears received a copy, the crux of Trustees' position is that national labor policy precluded the admissibility of Mears' testimony to that effect.

Mears contends (Br. 11-16) the *Benedict, Gatliff, Heinz, Toth* and *Mearns* cases[1] all cited in Trustees' certiorari petition (pp. 11-12, 16-22), and *Lewis v. Cable*, D.C., W.D. Pa., 1952, 107 F. Supp. 196, are distinguishable because each involved an admittedly executed agreement. The obvious lack of merit in Mears' position is seen, first, in the fact that *herein there is an agreement fully executed by Mears as a signatory operator-employer and by UMW as the collective bargaining representative.* Furthermore, Mears does not argue he was opposed to paying the royalty to the Fund or to any other provision therein. Since Mears admits (J.A. 48a) he and the union representative "had discussed most anything that was necessary to know about" the terms and conditions under which Mears' employees were to work, it follows that Mears consented to such terms and conditions which were to govern the employment of those who produced his coal and *he became legally bound to pay the per-ton royalty as a term agreed upon, even if there had not been a written agreement.* In the absence of objection to any of the terms and conditions of employment, the reduction of those terms and conditions to a written document was merely a fulfillment of the requirement of the Act's Section 8(d). Even prior to Heinz' mandate that agreements reached be reduced to writing "as a permanent memorial" (311 U.S. 514, 523) and the enactment of Section 8(d), Circuit Judge L. Hand impressively avowed the practical need for preserving in writing the results of collective bargaining because, as he noted, "without it the fruits" thereof "are exposed to the sport of

[1] *Lewis v. Benedict Coal Corp.*, 361 U.S. 459; *Gatliff Coal Co. v. Cox*, 6 Cir., 152 F. 2d 52; *H. J. Heinz Co. v. NLRB*, 311 U.S. 514; *Lewis v. Toth*, 3 Cir., 280 F. 2d 422; *Mearns v. Lewis*, 4 Cir., 268 F. 2d 427, 428.

fugitive and biased recollection". *Art Metal Const. Co.* v. *NLRB*, 2 Cir., 110 F. 2d 148, 150. In the case just cited Circuit Judge Hand further observed (p. 150):

> "It is indeed true, and for that matter a truism, that a stipulation in an oral contract that it shall be put into writing is one of its terms; and that if an employer must put it in, he is not free pro ta. to."

Hence, in light of Section 8(d)'s command, having agreed to the terms of employment, Mears had a statutory duty to reduce them to writing; he was "not free" to the extent which Section 8(d) required, and not having included in the written agreement the alleged oral condition he is precluded from reliance thereon.

This statutory demand of a "written memorial" emphasizes the absolute necessity of embodying in writing the whole agreement reached and rejecting as inadmissible any alleged prior or contemporaneous understanding not contained in the written memorial. Congress could not have contemplated otherwise. If national labor policy as expressed in Section 8(d) rejects (as *Toth*, *Gatliff* and *Mearns* hold, the validity of which Mears concedes) a prior or contemporaneous agreement to void an operator's written obligation to pay royalty in a specified amount to the Fund, it must necessarily render inadmissible Mears' testimony herein that he had a contemporaneous understanding with the union representative that the collective bargaining agreement was not to be effective until he received an executed copy thereof. In either of the situations noted the understanding is a prior or contemporaneous one. *Art Metal* stresses (110 F. 2d 150) that "it is

the merest casuistry to argue that the promisor's freedom to contract includes the opportunity to put in jeopardy the ascertainment of what [the employer] has agreed to do, or indeed whether he has agreed to anything at all. The freedom reserved to the employer is freedom to refuse concessions in working conditions to his employees, and to exact concessions from them; it is not the freedom, once they have in fact agreed upon those conditions, to compromise the value of the whole proceeding, and probably make it nugatory."

Mears' attempt to limit Benedict's holding that collective bargaining agreements must be granted a more secure and stable position in our National economy than that of ordinary common law contracts so that Benedict "applies only to this third party beneficiary status of a welfare fund" (Br. 11) is answered in the recent case of *Lewis* v. *Mill Ridge Coals, Inc.*, 6 Cir., 298 F. 2d 552, 557, wherein it is said of *Benedict*,

> "The Supreme Court has now placed collective bargaining contracts in a special class, exempt from some of the rules of construction traditionally applicable to contracts."

Mears relies heavily upon *NLRB* v. *Nash-Finch Co.*, 8 Cir., 211 F. 2d 622, but Trustees submit that, contrary to Mears' assertion, *Nash-Finch* supports their position. Here again, Mears would distinguish the instant case from *Nash-Finch* on the ground that there was therein "a valid completed contract" (Br. 15). Mears would leave this Court under the impression that the union in *Nash-Finch* regarded its signature to the contract as a prerequisite to a binding contract. What Mears fails to emphasize is that following *incompleted* negotiations on terms of a bargaining agree-

ment *and prior to the company's signing the agreement*, the union submitted a proposed draft to the company which was *not signed by either party*. Thereafter, the company signed and submitted an amended proposal which the union signed. Upon union contention its members were entitled to benefits not covered by the amended, executed contract, the Eighth Circuit declared that where contracting parties voluntarily place their engagement in writing in such terms as import a legal obligation, "*it is conclusively presumed that the entire engagement of the parties and the extent and manner of their undertaking have been reduced to writing*" (211 F. 2d 626). Implementation of the Eighth Circuit's rule would interdict the use of Mears' alleged agreement to avoid his contractual obligation.

The certiorari petition (pp. 2, 11) reveals the Third Circuit's Judges, acting en banc, divided equally upon the question of granting or denying certiorari. Mears' invitation that this Court disregard (Br. 16-17) the views of the four jurists who believed the instant case to be at odds with national labor policy, as expressed in Chief Judge Biggs' dissent, is to request this Court to ignore its approval in *U.S. v. American Foreign S. S. Corp.*, 363 U.S. 685, 689-90, of the statement:

> "The principal utility of determinations by the courts of appeals in banc is to enable the court to maintain its integrity as an institution by making it possible for a majority of its judges always to control and thereby to secure uniformity and continuity in its decisions . . ."

The confused and uncertain state of the rule in the Third Circuit, shown in the certiorari petition, indicates the necessity of the issuance of the writ.

## CONCLUSION

For the reasons discussed herein and in the certiorari petition, the writ prayed for therein should issue.

Respectfully submitted,

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